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Aida Dizon Garcia v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-05–171–06 OF 2012
BALIA YUSOF, ROHANA YUSUF AND UMI KALTHUM JJCA
5 FEBRUARY 2015

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Criminal Procedure — Defence — Innocent carrier — Filipina caught by police with huge amount of dangerous drugs in locked bag in her possession denied knowledge of the drugs — Key to bag's lock in her purse — Accused began crying and was trembling after she unlocked bag but refused to unzip it as ordered — Accused claimed she transported bag from Thailand to Kuala Lumpur as errand for someone — Whether accused while suspecting bag contained incriminating material had ample opportunity to inspect contents of bag — Whether 'wilful blindness' to what was in bag could not absolve accused of knowledge — Whether presumption of knowledge under s 37(d) of the Dangerous Drugs Act 1952 unrebutted

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The appellant, a Filipina, was convicted and sentenced to death by the High Court on a charge of trafficking in 11,956g of cannabis, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA'). The prosecution's evidence was that a police party found the drugs in a padlocked bag the appellant had in her possession while she was standing by the roadside after alighting from an express bus and removing the bag from the bus's luggage compartment. The appellant's defence was that she was an 'innocent carrier' and did not know the bag contained the drugs. She said she merely did an errand for someone named 'Joe' when she was in Bangkok to transport the bag to Kuala Lumpur. She said the bag was locked when Joe handed it to her and the key to the padlock was handed to her only when she boarded a bus en route to Kuala Lumpur. She kept the key in her purse. The appellant admitted that although she had the opportunity to inspect the contents of the bag she did not do so. The High Court found the appellant failed on balance of probabilities to rebut the presumption of knowledge under s 37(d) of the DDA; that the prosecution had proved its case beyond reasonable doubt and that the appellant's defence was not credible. The sole ground in the instant appeal against conviction and sentence was that the appellant had no knowledge about the drugs and was an innocent carrier.

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Held, dismissing the appeal and affirming the conviction and sentence:

(1) The trial court was right in dismissing the appellant's defence that she was an innocent carrier. On the facts of the case, the trial court rightly found that the appellant not only had custody and control but also the knowledge that she was carrying the cannabis in the bag when she failed to rebut the presumption under s 37(d) of the DDA. The appellant failed to substantiate her defence of 'innocent carrier' with cogent proof (see paras 32–33).

(2) When the appellant was told to unlock the padlock on the bag, she took the key from her purse and opened the lock and then refused to open the zipper of the bag. She broke down in tears and was shivering at the time. Her refusal to unzip the bag and her beginning to cry at that moment led to one inference and that was that she had knowledge of the contents of the bag and she was scared of being found out. She had the opportunity to inspect the contents of the bag much earlier but she chose not to do so. She wilfully shut her eyes to the nature of the contents of the bag although she suspected it might contain some incriminating material such as fake money. 'Wilful blindness' could not absolve the appellant of knowledge of the drugs (see paras 33–34).

(3) As the amount of cannabis involved was 11,956g, which was too much for personal use, the trial court was right to have found that the appellant was trafficking in the drug as defined in s 2 of the DDA (see para 37).

[Bahasa Malaysia summary

Perayu, warganegara Filipina, disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi atas tuduhan mengedar dadah kanabis sebanyak 11,956g, kesalahan yang boleh didenda di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Keterangan pihak pendakwaan adalah bahawa pasukan polis menemui dadah di dalam beg yang dikunci dalam milikan perayu semasa dia berdiri di tepi jalan selepas turun daripada bas ekpres dan mengeluarkan beg daripada bahagian bagasi bas. Pembelaan perayu adalah bahawa dia adalah 'innocent carrier' dan tidak mengetahui yang beg itu mengandungi dadah. Dia berkata yang dia hanya melakukan kerja suruhan untuk orang yang bernama 'Joe' semasa dia berada di Bangkok untuk membawa beg ke Kuala Lumpur. Perayu menyatakan beg dikunci apabila Joe menyerahkan beg tersebut kepadanya dan kunci kepada manga diberikan kepadanya hanya semasa dia menaiki bas yang dalam perjalanan ke Kuala Lumpur. Dia menyimpan kunci tersebut di dalam beg dompetnya. Perayu mengaku bahawa walaupun dia mempunyai peluang untuk memeriksa kandungan beg tersebut tetapi dia tidak berbuat demikian. Mahkamah Tinggi mendapati perayu gagal atas imbangan kebarangkalian untuk mematahkan anggapan pengetahuan di bawah s 37(d) ADB; bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah dan bahawa pembelaan perayu tidak boleh dipercayai.

Satu-satunya alasan dalam rayuan ini terhadap sabiatan dan hukuman adalah bahawa perayu tidak mempunyai pengetahuan mengenai dadah dan adalah pembawa tidak bersalah.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Mahkamah perbicaraan adalah betul dalam menolak pembelaan perayu bahawa dia adalah pembawa tidak bersalah. Atas fakta kes, mahkamah perbicaraan mendapati dengan betul bahawa perayu bukan sahaja mempunyai jagaan dan kawalan tetapi juga pengetahuan yang dia membawa kanabis dalam beg apabila dia gagal untuk mematahkan anggapan di bawah s 37(d) ADB. Perayu gagal untuk menyokong pembelaannya mengenai 'innocent carrier' dengan bukti yang menyakinkan (lihat perenggan 32–33).

(2) Apabila perayu diberitahu untuk membuka manga di beg tersebut, dia mengambil kunci daripada dompetnya dan membuka kunci dan enggan membuka zip beg tersebut. Dia terus menangis dan menggeletar pada masa yang sama. Keengganannya untuk membuka zip beg dan mula menangis pada ketika itu membawa kepada satu inferens bahawa dia mempunyai pengetahuan mengenai kandungan beg tersebut dan dia takut akan terbongkar. Dia mempunyai peluang untuk memeriksa kandungan beg tersebut terlebih dahulu tetapi memilih untuk tidak berbuat sedemikian. Dia sengaja menutup matanya kepada sifat kandungan beg tersebut walaupun dia mengesyaki yang ianya mungkin mengandungi bahan bersalah seperti wang palsu. 'Wilful blindness' tidak dapat membebaskan perayu terhadap pengetahuan mengenai dadah tersebut (lihat perenggan 33–34).

(3) Memandangkan jumlah kanabis terlibat adalah 11,956g, yang mana adalah terlalu banyak untuk penggunaan peribadi, mahkamah perbicaraan adalah betul mendapati yang perayu mengedar dadah seperti yang dimaksudkan dalam s 2 ADB (lihat perenggan 36).]

Notes

For cases on defence in general, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1934–2047.

Cases referred to

Ahmad bin Ibrahim v PP [2012] 6 MLJ 305; [2012] 7 CLJ 445, CA (refd)
Roslan bin Sabu @ Omar v PP [2006] 5 MLJ 244; [2006] 3 CLJ 607, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 37A(1), B, 39B(1)(a), 39B(2)
Dangerous Drugs (Special Preventive Measures) Act 1985
Evidence Act 1950 s 8

Appeal from: Criminal Appeal No 45–02 of 2011 (High Court, Seremban)

Gurbachan Singh (Bachan & Kartar) for the appellant.
Wan Shaharuddin bin Wan Ladin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Umi Kalthum JCA (delivering judgment of the court):

[1] The appellant was charged for an offence of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge reads as follows:

> Bahawa kamu pada 27 November 2010 jam lebih kurang 5.30 pagi di tepi jalan hadapan tol Seremban menghala ke Selatan, di dalam Daerah Seremban, di dalam negeri, Negeri Sembilan, telah didapati mengedar dadah berbahaya iaitu 'Cannabis' seberat 11956 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

THE PROSECUTION'S CASE

[2] On 27 November 2010, at 12am, PW5 (Insp Ikhwan Hilmi bin Ismail) who was attached to the Narcotic Criminal Investigation Department in Bukit Aman briefed a group of police personnel on a raid to be conducted on the same day at 3am.

[3] At 3am, SP5 and the raiding team boarded two unmarked police vehicles and proceeded to Jalan Duta Toll Plaza. They took their positions, one vehicle waited near the Shell petrol station while the other vehicle was directed to wait at the Jalan Duta Bus Station. Their target was to identify an express bus 'Star Express' with registration No BKJ6855 coming from the North and exiting through the toll to Kuala Lumpur. When the bus was spotted, PW5 and his team trailed the bus to the Jalan Duta Bus Station. PW5 saw passengers disembark from the bus however he didn't find the suspect getting off the bus. PW5 assumed that the suspect was still inside the bus. The bus proceeded to the next bus station and PW5 and his team trailed the bus until it stopped at Terminal One, Seremban to drop off passengers. The suspect however did not get off the bus. From Terminal One, Seremban, the bus proceeded to the Seremban Toll Plaza heading south towards Johor Bahru. About 50 meters after

the Seremban Toll Plaza, the bus stopped at the road side. The road then was illuminated by the light from the street lamps.

[4] PW5 saw the bus driver getting-off the bus and he was followed by a woman who alighted the bus through the passenger door at the front left side of the bus. The woman was wearing a white shirt and short pants. The bus driver then opened the door to the luggage compartment of the bus. The woman took two bags from the compartment while the bus driver helped her to take out another bag from the compartment. The woman also carried a bag on her shoulder. The bus driver then shut the door to the luggage compartment and left the scene. The woman was seen carrying the three bags towards a nearby tree and then made a phone call using her mobile phone which she took out from her handbag. PW5 ordered all members of the raiding team to move toward the woman. They were all in civilian clothes. PW5 ran towards the woman and introduced himself as Senior Police Officer from the Narcotics Division and showed her his authority card. PW5 spoke to her in English because based on information, the suspect is a foreigner. PW5 assumed that she cannot speak the Malay language. PW5 administered the caution under ss 37A(1) and B of the Act in English to her. According to PW5 the woman seemed shocked at the presence of PW5 and the raiding team at the time.

[5] PW5 then told the woman that he wanted to inspect her luggage and person and ordered her to open the bags one by one. She opened her handbag brand 'Canine', and PW5 took out a passport and two mobile phones. PW5 discovered that the woman's name is Aida Dizon Garcia, that is, the appellant/accused and that she is a citizen of the Philippines. Inside the handbag there were several small purses. In one purse labeled '75' on it, PW5 found a bunch of keys (there were seven keys). PW5 also found a bus ticket with the name of 'QISTINA EXPRESS Sdn Bhd' written on it, two units of mobile phones brand 'NOKIA' and 'NEX'. Then PW5 ordered her to open a bag white gray in colour with the brand 'MICKEY & MINNIE'. Apart from clothings and personal items, PW5 did not find any incriminating items in this bag. Then PW5 ordered her to open the blue bag labeled with the words 'LONG LIFE' and found no incriminating items inside it except for clothings and personal items.

[6] After that, PW5 directed the appellant to open the third bag which was brown in colour labeled with the word 'BLAZE' (P10). The bag was zipped and locked with a padlock. PW5 ordered her to unlock the padlock. The appellant in a state of panic took out a key from the purse with the brand '75' to unlock the bag. The appellant unlocked the padlock and she was trembling at the time. When, PW5 ordered her to unzip the bag, she did not open the bag and started crying while squatting in front of the bag. She watched PW5, who then unzipped the bag. PW5 found 12 clothings wrapped around 12 transparent plastic containing slabs of compressed dried leaves suspected to be ganja. PW5 ordered SP4 to arrest the appellant and the appellant said nothing. PW5 informed the appellant the reasons for her arrest. The items seized from the appellant, including money in Thai currency (Bhat), were placed inside the bonnet of the car ridden by PW5.

[7] The appellant then led PW5 together with his raiding team to a condominium at Taman Connaught, Cheras, Kuala Lumpur. The appellant told PW5 that she was supposed to get off the bus in Kuala Lumpur but she overslept until she reached the Seremban Toll. At the condominium car park, the appellant was allowed to use her mobile phone to make a phone call to someone. A Nigerian man was seen coming down to meet the appellant at the car park and this man was immediately arrested. PW5 together with five other members of his team went up to the Nigerian man's condominium unit on the 12th floor. At the condominium unit, PW5 and his team arrested another two Nigerian men and one of them was identified as 'Kelvin' (PW7). Inspections were conducted inside the unit. The appellant and the Nigerian men were brought to IPK, Kuala Lumpur. PW5 then lodged the arrest reports (D27 and D28) and marked the exhibits. At 1pm, SP5 handed over the appellant and the exhibits to the investigating officer, Insp Syarifah Norul A'ain bt Syed Salleh (PW2).

[8] Twelve slabs of compressed dried leaves found in the bag P10 was then sent by PW2 to the chemist Maimonah bt Sulayman (PW1) for analysis. PW1 found the slabs of dried leaves to be a dangerous drug of the type 'cannabis' as defined under s 2 of the Act with a total weight of 11,956g.

[9] At the end of the prosecution's case, the learned trial judge was satisfied, after having conducted a maximum evaluation of the evidence tendered by the prosecution, that the prosecution was successful in proving a prima facie case against the appellant based on s 37(d) and s 2 of the Act in respect of possession and knowledge as well as in respect of trafficking of the drugs, and called upon the appellant to tender her defence.

[10] The learned trial judge found that SP5's testimony was corroborated by PW4 and PW6. It was unchallenged facts that it was the appellant who took the bag containing the drugs (P10) from the luggage compartment of the bus, then carrying P10 and two other bags and putting them under the trees beside the road and unlocking the padlock of the zipper of P10 using the key kept in the purse taken from her handbag. Thus the presumption of knowledge under s 37(d) of the Act was invoked against the appellant whilst the appellant's act of 'carrying' P10 containing the drugs weighing in total 11,956g fell under the definition of 'trafficking' under s 2 of the Act.

THE APPELLANT'S CASE

[11] The appellant gave evidence on oath. In her defence, the appellant informed the court that she came to Malaysia on 6 May 2010 to find a job as a teacher and researcher in animation program. The appellant stayed at her friend's place named Mitchel at No 32, Taman Tayton View, Cheras. The appellant failed to secure a job after one week she was in Malaysia and she then went to Bangkok. The appellant then returned to Malaysia in June 2010 and stayed with Mitchel and after one week she went back to the Philippines. On 10 October 2010 the appellant came back to Malaysia and stayed at the same place. On 14 November 2010, Mitchel took the appellant to a restaurant in Cheras where she met Kelvin (PW7). Mitchel knew that the appellant's visa would expire soon and tried to get the help of PW7 to extend her visa. PW7 then invited the appellant to his home at Kondo Puncak Bayan, Taman Connaught, Cheras. PW7 invited the appellant to stay with him. The appellant stayed with PW7 for five days that is from 14–18 November 2010.

[12] On 18 November 2010, PW7 told the appellant to exit the Malaysian border and PW7 would give the appellant some money for this purpose. On the night of 18 October 2010, the appellant went to Bukit Jalil to take a bus to Thailand. PW7 gave the appellant the sum of RM5,000 and told the appellant that RM2,000 was for her expenses such as food, hotel and transportation while the remaining RM3,000 she was to pass it to PW7's friend named 'Joe' in Thailand. The next morning the appellant arrived at Hatyai and she had bought a bus ticket to go to Bangkok to meet 'Joe'.

[13] The appellant arrived in Bangkok on 20 November 2010 and from Bangkok she went to Laos where she gave the RM3,000 to Joe as instructed by PW7. The appellant also gave another RM5,000 to Joe. According to the appellant, the RM5,000 was transferred to the appellant by PW7's friend named Michael through Western Union Financial Institution, Laos on 22 November 2010. The appellant knew about the RM5,000 transfer after she received a sms from PW7. In total, the amount of money given by the appellant to Joe was RM8,000 as instructed by PW7.

[14] The appellant referred to her passport which was marked as exh P16A and it showed that there was an endorsement 'arrival 21.11.2010' and 'departure 23.11.2010' and 'LAO-PDR'. This confirmed that the appellant went to Laos during that period to hand over money to 'Joe'. According to the appellant, Joe then told her to return to Bangkok where he would meet her in Bangkok.

[15] The appellant arrived in Bangkok on 24 November 2010 and she met Joe that night. Joe came to the appellant's hotel room and gave two luggage bags to her. The bags were packed by Joe and they contained the appellant's clothings which Joe had taken from the appellant in Laos. Joe told the appellant that he had placed her clothes at the top of the bags. The appellant did ask Joe about the contents of the bags, which made Joe angry and he forbade the appellant from asking so many questions. The appellant could not inspect the contents of the bags because they were pad-locked by Joe. Joe told her that he would give the keys to the padlock upon the appellant boarding the bus from Bangkok to Hatyai. Joe then left the bags in the appellant's room. After one hour Joe returned with a bus ticket. Joe carried both bags to the bus terminal in Bangkok. At 9pm, the appellant boarded the bus to Hatyai. The keys to the padlocks were given to the appellant by Joe. The appellant kept the keys in her purse which was placed in her hand bag.

[16] Upon reaching Hatyai, the appellant took a taxi to Sadao together with the two bags. At Sadao, the appellant met with 'Jack' who had introduced himself as an officer of the Malaysian Immigration Department in her hotel room. Both bags were placed in her hotel room in Sadao. According to the appellant, it was PW7 who had arranged the meeting with Jack. PW7 and Joe often called the appellant while she was in her hotel room in Sadao. The appellant overheard Jack's telephone conversation with PW7 whereby Jack demanded money from PW7 to take the appellant and her bags to pass the immigration. Jack left the appellant's room at 3pm and only returned at 5pm, together with another person. The appellant admitted that she had the opportunity to inspect the contents of the bags but did not do so. The appellant believed that it was unethical to peek into the belongings of others. However, the appellant did suspect that the bag might contain fake currency as the appellant was aware that Africans are involved in faking currencies.

[17] At 5pm Jack came and helped the appellant to bring the bags down and placed them into a car. Jack took the keys to the padlocks from the appellant and inserted them at the side of the bags. The driver drove the appellant to the Malaysia-Thailand border while Jack trailed from behind using a motorcycle. The appellant passed by the Thai Immigration checkpoint without being checked and her passport was not stamped. After that the car was driven through the jungle without going through the Malaysian Immigration until finally the car stopped at a store and Jack was already waiting there. The bags were then transferred to another car. Then Jack together with the appellant boarded the same car and proceeded to the Alor Setar bus terminal and arrived there at 8pm. that night. Jack bought a bus ticket for the appellant which was scheduled to move to Kuala Lumpur at 9pm that night. The appellant then boarded the bus while the bags were placed in the bus cargo compartment.

[18] When she arrived at the Jalan Duta Bus Station, she did not get off the bus because she wanted to stop at Bukit Jalil bus terminal. However the appellant was asked to get down from the bus at Seremban Toll Plaza. The bus driver unloaded her three bags after she pointed out to him. The appellant tried to call the taxi driver whom she knew to come to the Seremban Toll Plaza to pick her up and send her to Cheras. The taxi driver told her to take a private car to Bukit Jalil Bus Station where he had been waiting for her for a long time. Shortly after that a white car approached the appellant who was waiting under a tree by the roadside. All three bags were with the appellant at the time. The appellant asked the man in the car whether he could send her to Cheras. The man agreed on condition that he was allowed to inspect the contents of the bags. The appellant allowed him to open the bags and gave the keys to the padlocks to the man as the appellant was holding a doll. The appellant told the man that apart from the bag 'Mickey & Minnie', the other two bags did not belong to her and the keys to the two bags were in the side pocket of the bags. The man took the keys out of the bag (P10) and opened and inspected the bags one by one, the 'Mickey & Minnie' bag, the blue bag and the brown bag (P10). At the same time in another car, there came a lady together with a few other men to where the appellant was. None of them introduced themselves to the appellant.

[19] After the bag P10 was opened and examined, the man said 'positive, positive', and the man then introduced himself as a police from Bukit Aman Police Narcotics Branch. The man instructed the lady to handcuff the appellant and took her to a car. The appellant was not informed that the police had found drugs in the bag P10. The police then inspected the appellant's hand bag and seized the mobile phones and doll belonging to the appellant. While in the police car, the police told the appellant about the drugs they found in the bag P10, however the drugs were not shown to the appellant. The appellant then started to cry and said the drugs were not hers. The appellant told them that the

bags were supposed to be delivered to PW7 at Taman Connaught, Cheras. The police took all three bags and placed them in another car. When they reached the Condominium Puncak Bayan, the appellant's mobile phone rang and the call was from PW7. The appellant informed PW7 that she was waiting at the ground floor. After a while a Nigerian man known to the appellant as 'Boy' came down to help the appellant with the bags. The man, however, was immediately arrested by the police. The police then took 'Boy' to the 12th floor of the condominium and after about 30 minutes the police took the appellant up to the condominium where the appellant informed the police that PW7 was the owner of the bag P10. PW7 said nothing to the police. The police conducted a search of the condominium unit and seized a red wallet which was later placed inside the appellant's hand bag. After about an hour, the appellant and PW7 were taken to Bukit Aman.

FINDINGS OF THE HIGH COURT

[20] At the end of defence case , the learned High Court judge found that the appellant had failed to rebut the presumption of knowledge under s 37(d) of the Act on the balance of probabilities. The learned trial judge therefore found that the prosecution had proved its case beyond reasonable doubt. The appellant was found guilty and sentenced to death as mandated under s 39B(2) of the Act.

[21] The learned trial judge had scrutinised the evidence of the appellant and the prosecution and found that the appellant's defence was not credible. The following was what the learned trial judge stated, at p 187, AR Vol 2, as follows:

> 16.5 Berdasarkan pembelaan-pembelaan ini, Mahkamah telah menjalankan analisa sama ada ia adalah '*credible*' atau tidak dan sama ada ia adalah '*inherently probable*' atau tidak. Mahkamah telah menguji pembelaan-pembelaan tersebut dengan keterangan prima facie pihak Pendakwaan sebelum ini. Mahkamah juga menggunakan mekanisme yang sama yang digunakan ke atas saksi-saksi pihak Pendakwaan di dalam menilaikan '*credibility*' OKT di dalam memberikan pembelaan beliau. Setelah ini dilakukan Mahkamah ini mendapati bahawa keterangan pihak Pembelaan ini tidak 'credible' dan amat sukar dipercayai.

THE APPEAL

[22] Before us, learned counsel for the appellant submitted on one broad ground that the appellant had no knowledge about the drugs (P11 (A1–A12)) contained in the bag P10 and therefore the appellant was an 'innocent carrier'.

[23] Learned counsel submitted that as can be seen right from the very beginning after the appellant was arrested, the appellant had informed PW5 that the bag P10 belonged to Kelvin (PW7). The appellant then took PW5 and his raiding team to the condominium where PW7 was staying and which subsequently led to the arrest of Kelvin. Therefore the appellant's defence that the drugs belonged to Kelvin (PW7) was neither an afterthought nor a bare denial without any proof.

[24] The appellant had also informed the investigating officer (PW2) that she had no knowledge about the contents of the bag when the appellant's cautioned statement (D25) was recorded after she was arrested.

[25] Furthermore, after she was arrested and after being informed by PW5 that he was a police officer from Narcotics Department, the appellant was calm and she did not try to run away. Therefore a reasonable inference could be made that the appellant had no knowledge about the drugs in one of the bags. Had she known about the drugs in P10, the appellant would have panicked or started crying the moment PW5 introduced himself as police officer.

[26] The appellant further submitted that the investigating officer had failed to conduct a finger print dusting over the drugs and had failed to take finger nail clippings from the appellant. The investigating officer had also failed to investigate on the origin of the drugs. The appellant also highlighted to the court there had been no outcome on the investigation over the two mobile phones confiscated by the police. Therefore the appellant was deprived of the chances to prove that numerous phone calls were made by PW7 to the appellant.

[27] Learned counsel for the appellant also submitted that the learned trial judge had failed to consider the fact that PW7 is currently detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('LLPK') vide the detention order marked as exh D34 . It was submitted that the reason for the detention was in respect of PW7's activity in trafficking drugs. This was based on the fact that between the period of 14–27 November 2010 PW7 had hired a Filipino woman as carrier to carry drugs for payment of RM250–RM300 per kg. Learned counsel submitted that the appellant in this case is the Filipino woman mentioned in the said order. Therefore the evidence of the appellant was validly substantiated by exh D34.

[28] In reply, the learned DPP submitted that the appellant had never disputed that the bag P10 was in the appellant's possession at all material times. The appellant only disputed about the knowledge of the contents of the bag P10. From the evidence of PW5, the key to the padlock for bag P10 was kept by the appellant in her purse (P19B (1)) inside P19(A). When PW5 instructed the appellant to open the bag P10, the appellant used the key to unlock the padlock. However when instructed to open the zipper of bag P10, she refused and she broke down in tears. Before opening the padlock her conduct of shivering and being nervous indicated that she had the necessary knowledge of the contents of the bag P10. The fact that the key to the padlock was kept by the appellant in her handbag and her conduct, that is, crying, was a clear sign of knowledge. She had never cried when asked to open any other bag except the one containing the drugs.

[29] The investigating officer SP2 in her evidence also confirmed that the appellant was not an innocent carrier as she knew about the contents of the bag P10.

[30] In response to the appellant's contention that PW7 had hired the appellant to carry the drugs and that the appellant had no knowledge of the contents of the bag P10, the learned DPP referred to PW7's detention order dated 7 February 2011 (D34). The learned DPP submitted that the oral evidence given by the appellant in court that she did not know the contents of P10 seemed to be in contradiction with the statement in D34. In D34, it was stated that the Filipino lady was hired/paid to carry 'ganja' (cannabis) from Laos into Malaysia in payment of RM250–RM300 per kg. This showed that, if it was true that the Filipino lady referred to in the detention order was the appellant, the appellant knew that she was carrying drugs from Laos and that she would be paid based on the weight of the drugs she carried.

[31] The prosecution referred to the Court of Appeal case of *Roslan bin Sabu @ Omar v Public Prosecutor* [2006] 5 MLJ 244 at p 252; [2006] 3 CLJ 607 at p 615, where James Foong JCA (as he then was) stated:

> ... This is what Professor Glanville Williams in his text 'Textbook on Criminal Law' at p 125 called 'willful blindness'. when he said:
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> > ... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know.

[32] In *Ahmad bin Ibrahim v Public Prosecutor* [2012] 6 MLJ 305; [2012] 7 CLJ 445 (CA), Azahar Mohamed JCA (as he then was) delivering judgment of

the court held, at pp 313 (MLJ) 454 (CLJ), para 10, as follows:

> [10] Turning now to the third ground, it was argued by learned counsel that the learned High Court judge had failed to appreciate the evidence given by the appellant that he was an innocent carrier of the bag containing the cannabis for Iskandar and that the appellant had only momentary custody and control of the bag without knowledge that the bag contained cannabis. According to the appellant, there was a lack of judicial appreciation of the defence of the appellant. A defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying, for example a bag, as in the case before us, containing the dangerous drugs but disputes having knowledge of the drugs. Whether it will succeed or not would very much depend on the facts of each case. In considering this ground, we had scrutinised with care the judgment of the learned High Court judge. The learned High Court judge had expressly referred to the defence and had carefully considered it. This is what the learned judge said in his judgment:
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> > The proven facts showed that the accused had descended the staircase of the first floor and was standing on the five foot way with the bag in his right hand. Even assuming for a moment that it was true that Iskandar had given him the bag, he had willingly taken custody of the bag and he was in control of the bag at the material time. He also had ample opportunity to look into the bag before he made or continued his descent down the staircase. He chose not to do that. From his suspicious and guilty conduct and his failure to rebut the inference that was made by the court of his guilty knowledge of the cannabis inside the bag the court was satisfied beyond a reasonable doubt that he had mens rea possession of the cannabis.
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> [11] As noted by the learned High Court judge in her judgment (see p 115 *Jld* 2 of the appeal record) the physical condition of the bag the appellant was holding in his right hand showed that it could be easily opened in order to discover its contents and that the cannabis, which is the subject matter in respect of the offence charged was wrapped in transparent plastic. The appellant could have easily opened the bag to check its contents. A person who on purpose shut his eyes to the obvious for the reason that he did not want to know would be taken to have the necessary knowledge. The learned High Court judge had judicially appreciated and considered the defence of innocent carrier. On consideration of the evidence in the appeal record of the present case, in our judgment, the learned High Court judge was entitled and correct in rejecting the innocent carrier defence. Moreover, in our judgment, the appellant's demeanour and conduct at the material time would show that he was aware of the cannabis in his possession. The demeanour and the conduct as well as the reaction of the appellant upon being confronted by the police were clearly admissible under s 8 of the Evidence Act 1950 on the issue whether the appellant having knowledge of the offending drug at the material time (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717).
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> ...

[33] In the present case, we found that the learned High Court judge was right to dismiss the appellant's defence of innocent carrier. On the facts of the case, the learned trial judge had rightly found that the appellant had not only

A the custody, control but also the knowledge that she was carrying the cannabis in the bag P10 by invoking the presumption.

[34] We found that the learned trial judge did not err when he found the appellant had failed to rebut the presumption of knowledge under s 37(d) of the Act when she raised the defence of innocent carrier. We agreed with the learned judge when he found the appellant had not substantiated her defence of innocent carrier with cogent proof as the conduct of the appellant had clearly shown otherwise. From the evidence of PW5, the appellant was instructed to open the bag P10. At that time, P10 was zipped and was locked with a padlock. PW5 had instructed the appellant to unlock the padlock. The appellant took the key to the padlock from her purse (P19B(1)). The appellant then used the key to open the padlock, but had refused to open the zipper of bag P10. The appellant then broke down in tears and she was shivering at that time. We found that the appellant's refusal to unzip the bag and began crying at that moment could only lead to one inference, that is, that the appellant had the knowledge of the contents of the bag P10 and that she was scared at being found out.

[35] We were satisfied that the learned trial judge had rightly found that the appellant had the opportunity to inspect the contents of the bag P10 when she was in Bangkok and Sadao, but the appellant chose not to open and inspect the same. The appellant had willfully shut her eyes to the nature of the contents of the bag she carried although the appellant had the suspicion that the bag contained incriminating material such as fake money. Had the appellant opened the bag she would have found the 12 slabs of drugs wrapped with a transparent plastic in the bag. We therefore agreed with the learned DPP's submission that 'willful blindness' would not absolve the appellant with the knowledge of the drugs (see *Roslan bin Sabu* and *Ahmad bin Ibrahim*).

[36] As for the detention order D34 which the appellant relied heavily on to exculpate herself from the knowledge of the drugs, that the drugs she carried belonged to PW7 and that she was merely an innocent carrier, it was obvious that the learned trial judge did not give any weight to it as he found her defence to be full of contradictions and therefore wholly incredible and with no merit. In fact, if the statement of facts in D34 were to be taken into account, we would agree with the learned DPP's submission that D34 all the more showed that the appellant was paid to take the drugs from Laos in return for payment of RM250–RM300 for each kilogram of the drugs and that she knew the nature of the drugs she carried. D34 did not help the appellant in her appeal. We did not see any error by the learned trial judge in his findings of fact and we do not see any reason to disturb his findings.

[37] Since we agreed with the finding of the learned trial judge that the appellant knew about the drugs contained in P10, there was therefore no necessity to secure the finger nail clippings of the appellant nor to dust the drugs packaging as contended by the learned counsel of the appellant. Lastly, the amount of cannabis involved was 11,956g in weight, which was too much for personal use, and the learned trial judge was right to have found the appellant trafficking in the cannabis as defined in s 2 of the Act.

[38] Having considered all the evidence presented in totality, we agreed with the learned trial judge that the prosecution had proven its case beyond reasonable doubt. We were also satisfied that the conviction of the appellant was safe. We unanimously dismissed the appeal and affirmed the conviction and sentence imposed by the learned trial judge.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar